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# Supreme Court Decisions

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# Supreme Court Decisions

*Quo Warranto; Denver Housing Authority; Constitutional Law. No. 14700. Decided March 25, 1940—People v. Newton et al.. District Court, Denver. Hon. Joseph J. Walsh, Judge. Affirmed. En Banc.*

FACTS: A. Relator brought quo warranto against Denver Housing Authority alleging usurpation of franchises, privileges and grants, in that it seeks, with public money, to acquire by grant and condemnation, real estate of great value, thereon to build apartment houses and other dwellings, all to be exempt from taxation, to borrow money thereon, etc., to the damage of the people.

B. The Authority answered, inter alia, that it is a body politic and corporate, created under and by virtue of Chapter 132, 1935 S. L. The lower court sustained the Authority.

HELD: 1. To take advantage of the funds and credits provided by the United States Housing Act (42 U.S.C.A., Sections 1401-1430) the State Legislature properly enacted Chapters 131 and 132, S. L. 1935, giving cities of the first class permission to engage in slum clearance and housing projects, etc.

2. Acts of such character are of "public concern and a proper exercise of the police power under state sovereignty."

3. The legislative acts are not violative of Article XX of the State Constitution, for the People in adopting Article XX never intended to surrender or relinquish any portion of the state's police power to declare the public policy of the state.

4. Under the Article, the city may assume exclusive control of all matters of a local and municipal concern; and where it has done so, state laws are not applicable as to such matters. But, the city did not amend its charter to authorize such powers as were granted by the legislature to the Denver Housing Authority.

5. The theory that the state loses all jurisdiction over a home-rule city in matters of local and municipal concern is untenable. Denver not having exercised the authority to legislate by amending its charter, the state law controls.

6. The legislature has the right to create quasi-municipal corporations and to provide for their personnel and manner of administration in any way it sees fit.

Opinion by Mr. Justice Bock.

*Wills; Mutual Wills. No. 14545. Decided April 15, 1940—Wehrle, et al. v. Pickering. District Court, Grand County. Hon. Charles E. Herrick, Judge. Reversed. In Department.*

HELD: 1. Evidence examined and found to be sufficient to lead to the conclusion that husband and wife entered into an agreement to execute mutual and irrevocable wills with the understanding that on the death of either the other was bound.

2. Such a disposition of property is lawful, and the execution of either will is a sufficient consideration for the execution of the other.

3. An attempt to enforce such agreement is not an attempt to enforce a mere oral contract. Such contract is evidenced in part by the writings, which one party has fully performed.

4. To establish a trust under such an alleged agreement, the evidence must be, and in this case is, clear, strong and unequivocal.

Opinion by Mr. Justice Burke. Mr. Justice Bakke and Mr. Justice Bock concur.

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*Workmen's Compensation; Compelling Claimant to Submit to Operation. No. 14732. Decided April 15, 1940—Overton v. City and County of Denver. District Court, Denver. Hon. Stanley H. Johnson, Judge. Affirmed. In Department.*

HELD: 1. Where it appears that claimant receives compensation under the act, and where upon request of Industrial Commission he is examined by a number of doctors and all but claimant's advise a major operation and state that claimant's chance of survival are at least 85 per cent, the commission may suspend compensation payments unless claimant submits to the operation.

2. Reasonableness of claimant's refusal to submit to operative treatment is a question of fact to be determined by the Commission.

Opinion by Mr. Justice Bakke.

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*Receivership; Petition; Demurrer; Mechanic's Liens; Sufficiency of Petition to Overcome Receivership Record. No. 14672. Decided April 15, 1940—Con K. O'Byrne v. C. Frederick Stirn, et al. District Court, Gilpin County. Hon. Samuel W. Johnson, Judge. Affirmed. In Department.*

HELD: 1. Notwithstanding the fact that a cause of action would ordinarily be stated sufficient to overcome a demurrer, a petition filed in the receivership case to try title to certain property after direction therefor

by the Supreme Court upon a hearing for stay of execution in another case involving the same matter will be measured as to its sufficiency in the receivership proceeding by matters dehors the petition as revealed by the receivership record.

2. Since the record therein reveals that the property was subject to liens, foreclosed upon and sold to satisfy lien claimants, and petitioner did not allege in his petition to try title that he had complied with the mechanic's lien law requiring notice, and since the petition did not state that any proceeds from the sale remained in the receiver's hands over and above that to satisfy lien claimants, the petition was vulnerable to general demurrer.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Hilliard and Mr. Justice Burke concur.

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*Condemnation; Witnesses; Value of Land; Argument of Counsel; Instructions. No. 14565. Decided April 15, 1940—Denver v. Lyttle. District Court, Arapahoe County. Hon. Samuel W. Johnson, Judge. Affirmed. En Banc.*

HELD: 1. " 'Whenever it is desired to have the opinion of a witness on the subject of value, it is always necessary, whether the witness is offered as an expert or not, to lay some foundation for the introduction of his opinion by showing that he has had the means to form an intelligent opinion,' derived from an adequate knowledge of the nature and kind of property in controversy and of its value."

2. " 'Whether a witness called to testify to any matter of opinion has such qualifications and knowledge as to make his testimony admissible, is a preliminary question for the judge presiding at the trial; and his decision is conclusive unless clearly shown to be erroneous in matter of law'."

3. Evidence of sales is not the only criterion for determination of value. " 'Any reasonable future use to which the land may be adapted or applied by men of ordinary prudence and judgment may be considered in so far * * * as it may assist the jury in arriving at the present market value'."

4. Evidence of offers to sell and certain sales made in the community about the same time were properly excluded since it was common knowledge that the land would be condemned, and the offers were made shortly prior to the time of the institution of the proceedings.

5. The court did not err in refusing to strike the following statement of counsel for defendant in argument: "And every man in that neighborhood knew if he did not sell he would be condemned."

6. Instruction considered and found to have been properly refused since not based upon a fair statement of the testimony given by the witnesses to whom reference was made, and since its general purport was already covered.

Opinion by Mr. Justice Bakke. Mr. Justice Bouck, Mr. Justice Bock and Mr. Justice Burke dissent.

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*Quiet Title; Real Estate; Tax Deed; Notice. No. 14697. Decided April 29, 1940—Taylor v. Lutin. District Court, Pueblo County. Hon. Harry Leddy, Judge. Reversed. En Banc.*

HELD: 1. Tax deeds are void where it appears that the property on which they were issued was in the actual possession or occupancy of persons not served with notice personally or by registered mail as required by Section 255, Chapter 142, '35 C. S. A.

2. Where several neighbors knew the party in actual possession was a tenant during 1932, and where the record, as a whole, shows that the tenant conducted some farming operations on the land, and had a right so to do from March, 1932, to March, 1933, and where it appears that a deputy treasurer, with the prospective recipient of the tax deeds, went to the land during said period for the purpose of serving the statutory notice, and admitted seeing a horse and a small patch of maize on the land, and they inquired of a man who came by as to who had possession and he stated he did not know, and where it appears that they called at tenant's place, but found no one at home, and where it appears that they made no further inquiries of the neighbors in the vicinity; and where it appears that owner of tax deeds, after issuance of deeds, learned from the tenant that he had been leasing the land from one of the record owners. there is sufficient evidence that there was a party who had possession and occupancy of the land who was not given the proper notice.

Opinion by Mr. Justice Young. Mr. Justice Bouck dissents, and Mr. Chief Justice Hilliard not participating.

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*Water Rights: Right of Way; Injunction; Quiet Title. No. 14638. Decided May 20, 1940—Ronce, et al. v. Favre, et al. District Court, Eagle County. Hon. William H. Luby, Judge. Affirmed. In Department.*

FACTS: A. Plaintiffs, claiming right to use for domestic purposes water arising from springs on defendants' lands, sought to lay a pipeline

for the conveyance thereof across defendants' lands to a highway, and thence along highway to plaintiffs' property.

B. Defendants forcibly excluded them, whereupon they brought injunction. The defenses included, inter alia, denial of plaintiffs' ownership of the water and right of way, denial of the county board's right to issue the license, allegations of defendants' ownership by adverse possession and by virtue of being innocent purchasers for value; also laches, abandonment and certain statute of limitations.

C. By way of counter claim, defendants sought to quiet their title against plaintiffs' claims. After trial to court, the evidence was found to be insufficient to support either the writ or the counter claim, and the action was dismissed.

HELD: 1. The adjudication of such claims and their protection is not the function of injunction.

Opinion by Mr. Justice Burke. Mr. Justice Knous and Mr. Justice Bock concur.

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*Cooperative Marketing Associations; Contributions Under Unemployment Compensation Act; Exemption. No. 14711. Decided May 20, 1940—Industrial Commission v. United Fruit Growers Association. District Court, Mesa County. Hon. Straud M. Logan, Judge. Affirmed. En Banc.*

HELD: 1. Under the definitions promulgated by the Industrial Commission's regulation No. 6, the labor involved in the activities of a cooperative marketing association, organized under the cooperative marketing law (S. L. 1923, p. 420 et seq.) was "agricultural labor" and exempt from the operation of the Unemployment Compensation Act.

2. "The association is a nonstock, nonprofit, cooperative organization of agriculturists actively engaged in the business of growing fruit on farms and in orchards for the purpose of sale, and the operations of the association consist solely of marketing the fruit crops of its members, the remission of the proceeds therefrom after the payment of the expenses on a pro-rata basis, and purchasing and distributing supplies to members for their use in growing and marketing their crops."

3. If the labor employed by one individual grower in marketing his crop is within the exception of the statute, as unquestionably is the case, it would seem that if two or more farmers pool their crops and cooperate in marketing them, their situation would not be different from that of the individual grower.

Opinion by Mr. Justice Knous. Mr. Chief Justice Hilliard not participating. Mr. Justice Bock dissents.

*Municipal Corporations; Liability for Damages Caused by Excavation Shovel While Rented to Private Individual. No. 14771. Decided May 20, 1940—Mill v. City of Fort Collins. District Court, Larimer County. Hon. Claude C. Coffin, Judge. Reversed. En Banc.*

HELD: 1. A municipal corporation is liable for its negligence while engaged outside the corporate limits in a private enterprise for profit.

2. Digging silos is no part of the governmental function of a city.

3. Even if the contract to dig the silo for a profit were held to be ultra vires, the city, receiving a benefit from it, cannot set up against a third person injured by the city's negligent operations pursuant to the contract the fact of its being ultra vires to defeat recovery.

Opinion by Mr. Justice Young. Mr. Justice Bouck dissents. Mr. Chief Justice Hilliard not participating.

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*Application for Additional Support Money for Minor Children; Husband and wife. No. 14522. Decided May 20, 1940—Smith v. Smith. District Court, Denver. Hon. Henry S. Lindsley, Judge. Reversed. In Department.*

HELD: 1. " 'A man may not shun marital obligations assumed in one relationship by contracting others while some of the duties imposed by law in the first still persist'."

2. Evidence considered and found not to justify trial court's action in giving more heed to father's added burdens than to the apparent increased needs of the children of his first marriage.

3. The lack of full exposition of all the facts in relation to the reasonable requirements of the children necesitates a further trial to bring out such facts.

Opinion by Mr. Chief Justice Hilliard. Mr. Justice Bouck and Mr. Justice Bock concur.

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*Contracts; Real Estate; Uncertainty of Description; Statute of Frauds; Competency of Husband to Testify in Civil Suit. No. 14371. Decided February 13, 1940—Boyd v. McElroy. District Court, Grand County. Hon. Charles E. Herrick, Judge. Affirmed. In Department.*

HELD: 1. A contract concerning real estate is not void for uncertainty in description where it appears that everyone connected with the deal knew what land was involved, and where it further appears

that the trial court permitted the description to be read into the record from the county clerk's records, to which there was no objection.

2. The statute of frauds, itself, provides that "nothing in this chapter contained shall be construed to abridge the powers of courts of equity to compel specific performance of agreements, in cases of part performance of such agreement."

3. Though an agreement might have been void under the statute of frauds, it became binding on the defendant when fully performed by the plaintiff.

4. A husband is not incompetent to testify in a civil suit or proceeding between the husband and wife.

Opinion by Mr. Justice Bakke. Mr. Chief Justice Hilliard and Mr. Justice Burke concur.

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*Criminal Law; Evidence; Other Offenses; Credibility; Witnesses. No. 14647. Decided January 9, 1940. Schechtel v. People. District Court, Denver. Hon. Floyd F. Miles, Judge. Affirmed. En Banc.*

HELD: 1. Where, in a trial where defendant is charged with unlawfully conspiring to utter a forged and fictitious bond, reference as to other crimes was made in the testimony of the accomplices, and related to defendant's business activities, indicating that some of them were not legitimate, and where it appears that the purpose of the testimony was to show defendant's financial status and difficulties, and his motive in entering into the conspiracy charged, and where it appears that his financial liabilities were large and, in comparison, his assets were very small, the evidence of the accomplices was clearly material and admissible for such purposes, particularly where trial judge was eminently fair to defendant in his rulings and specifically and properly limited the application of the questioned evidence in his instructions.

2. It is the law that one may be convicted upon the uncorroborated testimony of accomplices, but to support the conviction it must be clear and convincing, must be received with great caution, and show guilt beyond a reasonable doubt.

3. The credibility of the witnesses is to be determined by the jury.

Opinion by Mr. Justice Bock. Mr. Justice Bouck and Mr. Justice Young not participating.

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